CRIMINAL APPEAL NO. 1436 OF 1984.

Date of decision: 16.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. K.P. Raval, A.P.P. for appellant-State.
Mr. H.D. Vasavada, advocate for respondents/accused.
Mr. M.J. Budhbhatti, amicus curiae, appointed by Court.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 16, 1996.

Oral judgment (Per Jain, J.)

Learned Additional Sessions Judge, Vadodara, vide his judgment and order dated 16.8.1984 passed in Sessions Case No.76 of 1984 acquitted all the four respondents for the offences under Sections 302, 323, 324, 326 and 34 of Indian Penal Code. Aggrieved by the order of acquittal, the State preferred this appeal.

At the outset, we may say that the appeal against respondent No.1, Revjibhai Jethabhai Padhiyar, who is the original accused No.1, abates as he has already expired on 7.9.1987, that is, during pendency of this appeal. Mr. Budhbhatti, learned advocate for the accused, has also produced xerox copy of the certificate dated 12.11.1987 as an evidence about death of respondent No.1. In view of this fact, the appeal qua respondent No.1/original accused No.1 abates and we need not to examine the evidence in relation to him.

This matter is notified at Sr.No.7 in our board for final hearing (acquittal matters) commencing from 22.1.1996. From the record, we found that the respondents though served are not represented by any lawyer and, therefore, we requested Mr. Budhbhatti, to appear as amicus curiae and assist the Court representing the case of the accused. We are thankful to Mr. Budhbhatti for readily accepting our request and arguing vehemently on behalf of the remaining respondents, namely, respondents No.2, 3 and 4.

The matter was partly heard on 8.2.1996 and was adjourned for 15.2.1996 just with a view to secure presence of respondents. On 15.2.1996, Mr. H.D. Vasavada, learned advocate, appeared and mentioned that though he had filed his appearance his name is not shown on the record and, therefore, was not able to remain present in Court when the matter was taken up. We have checked up record but do not find any reference for his appearance. However, he has not objected to the appearance of Mr. Budhbhatti as amicus curiae and joined him to proceed with the matter.

Today, we resumed hearing in presence of respondents No.2, 3 and 4, who, in response to our order dated 8.2.1996, have remained present in Court.

It will be apposite to note the salient features of the prosecution case as laid against the respondents-accused.

That the complainant, P.W.2, Chhitubhai Jinabhai Dabhi, resident of Tarsali and at the relevant time residing at Narsipura, Taluka Padra, District Vadodara, had purchased agricultural land bearing S.No.22 from Bakorbhai Khumanbhai for consideration of Rs.3999/- The said land was admeasuring about 57 Gunthas. Right from the day of purchase, he was cultivating and reaping crops. During rainy season of the relevant year he yielded crop of Bajra and in the later part of the year he sown wheat.

As the wheat crop was ready for reaping, he alongwith his father-in-law, deceased Bhikhabhai Bhimabhai and some other hired labourers went to the field. At that time he saw that the accused alongwith their family members were reaping wheat crop. The act of accused was questioned by the complainant and his companions. This question was followed by hot exchange of words between two groups lodged counter allegations about ownership of the field. In the meanwhile, the accused, on being questioned by the complainant's side, got provoked, went inside their house, came out with weapons and attacked deceased Bhikhabhai Bhimabhai Padhiyar and other persons. As alleged, accused No.1, Ravjibhai Jethabhai (deceased), was armed with scythe, accused No.2 with spear and accused Nos. 3 and 4 with sickles. All of them jointly rushed towards the complainant and his companions. Deceased Bhikhabhai Bhimabhai tried to run away. However, he was chased and was attacked by accused No.1, with scythe blows on head and both the hands. Accused No.2 gave spear blow and others with sickles. Accused No.2 also attacked and injured witness Dipsing Bhimsing and Chhagan Bhuja. Accused No.2 also gave spear blow and injured the complainant. Hearing the quarrel and commotion villagers also assembled there. In the meanwhile, all the accused had made good their escape from the scene of offence with weapons. In this background, the investigation was commenced and all the accused were charged for offence under Section 302 read with Section 34 of the IPC as well as under Sections 324 and 326 read with Section 34 of IPC. The learned Judge, after appreciating the evidence, acquitted all of them.

We have heard learned A.P.P. Mr. K.P. Raval for the appellant- State and M/s. M.J. Budhbhatti and H.D. Vasavada, learned advocates, for respondents/accused.

While going through the evidence and reasonings given by the learned trial Judge in his judgment, we find following factors which have weighed with the learned Judge for giving acquittal:

1. Discrepancies about place of occurrence,
2. Uncertainty of weapons used by individual accused,
3. absence of corroboration by independent witness.

According to learned trial Judge, the witnesses are not consistent about place of occurrence and thus casts doubt about prosecution case. As argued by Mr. Budhbhatti, looking to the allegations made in complaint, Ex.24,

apparently it transpires that the incident took place in the disputed field, that is, S.No.22, admeasuring about 57 gunthas alleged to have been owned by the complainant. Whereas in the later part of the complaint, the dead body of the deceased, Bhikhabhai Bhimabhai, was found lying on the border of adjoining field, owned by Sursing Prabhatsing. The complainant has testified at Ex.23 as P.W.2. According to the testimony of complainant, at the relevant time, they were standing in the disputed field and on seeing that accused are to attack them, his father-in-law, the deceased Bhikhabhai Bhimabhai, ran towards the field of Sursing Prabhatsing. He was chased by accused No.1 and was attacked and injured as referred to in the evidence. Now, coming to the evidence of P.W.3, Chhaganbhai Bhujabhai, Ex.25, we find the evidence as if quarrel had taken place in the adjoining field owned by Sursing Prabhatsing, whereas in cross-examination, the witness has admitted that the incident took place near Chheda (narrow passage between two agricultural fields). With this evidence, the learned Judge came to the conclusion that prosecution evidence about the place of occurrence of incident is not consistent and is full of discrepancies and thus gives rise to a doubtful case and cannot be relied upon. This is one of the factors which has weighed the learned Judge for giving acquittal. Mr. Raval, learned A.P.P., has read the oral testimony of all the witnesses. On close and careful scrutiny, we find that there is no inconsistency about the place of occurrence and the evidence is consistent on this point. As a cardinal rule, the evidence has to be appreciated having regard to the class, culture, educational background and the area to which witnesses belong. A witness coming from tribal area or being an illiterate agriculturist cannot be expected to be as precise as a man of urban culture or elited class and literate. The evidence has also to be appreciated in light of customs and practices prevailing, of course, without sacrificing the basic principle of Evidence Act, namely, otherwise being reliable and trustworthy. It is true, as evident from the complaint, Ex.24, that at the relevant time both the parties were standing in the disputed field. There was a hot exchange of words with regard to the ownership of crops and right of reaping. The accused got provoked, went inside their house, came back with weapons and ran towards the complainant and other witnesses standing in disputed field. On seeing them, the deceased Bhikhabhai Bhimabhai and others started running. The deceased was chased and was attacked near the 'chheda' and then the deadbody was found on the border of adjoining field. Naturally, in such circumstances, a person one who is under

apprehension of danger, would run towards the passage which may pave his way for safe escape. As stated above, 'chheda', the passage between two fields is always very narrows and just abutting on boundaries of both the fields, it becomes very difficult to be precise about demarcation of both the fields. Even a judicial note can be taken that in urban areas the fields are always divided by thick fence having width of 3 to 4 ft. and in that case it becomes very difficult to demarcate the exact border of either of the fields. P.W.3 has also deposed on similar line that the accused No.1 attacked deceased Bhikhabhai in the chheda, that is, passage in between the fields, i.e., on the border. But definitely forming part of disputed field. The same situation may be described by one as disputed by another as 'chheda' and by third one as border of adjoining field and yet it is same and amenable to no two meanings. Hence much significance cannot be attributed to this aspect. Thus, Mr. Raval, learned A.P.P., has rightly argued that all the witnesses are consistent that the incident occurred just on the border or nearby the boundary of both the fields. In our view, the evidence is consistent and refers to same place and spot and thus the learned Judge is not right in taking a different view which is not fortified by evidence on record. It is true that if the testimony of all the witnesses if viewed so technically obstensibally we may find so called discrepancies but this aspect has to be appreciated in light of the type of witnesses. As we said, the witnesses are from rural area, agriculturist and illiterate. Such witnesses cannot be expected to be very precise. For them a distance of 1 Km. hardly matters and, therefore, whenever such witnesses estimate distance, they give their estimation how they view it in practical life. Consequently, this factor has to be borne in mind when the Court appreciates the evidence of such witnesses. As regards use of weapons, the learned Judge has said that the witnesses have given dramatic statements about the details of attack on the victim. According to the learned Judge, all the accused had simultaneously attacked and, therefore, it becomes difficult to attribute role to the individual accused qua the injuries and in absence thereof the evidence of witnesses cannot be relied upon. In our view, the learned Judge has fell in error in appreciating the prosecution evidence on this point. P.W.2, the complainant, has accurately given account of weapons used by individual accused. According to him, the deceased Bhikhabhai Bhimabhai was attacked by accused No.1 (deceased) with scythe and with spear by accused No.2. Accused No.3 caused injury to P.W.3, Chhaganbhai Bhujabhai, by using sickle and accused No.2

gave spear blow to Dipsing Bhimsing, P.W.4. Accused No.2 also caused injury to one Prabhatsing. In our view, this evidence is very clear without leaving any doubt or ambiguity about use of weapons. This witness has not been shaken in cross-examination. Nor even we find any suggestion, the answer to which may raise doubt about use of weapon. P.W.3, Chhaganbhai Bhujabhai, has also been examined at Ex.25. He is one of the injured ocular witness. In later part of paragraph 1 of his examination-in-chief, he has given details as to who caused injuries to whom and with what type of weapons. Except a suggestion for giving false evidence owing to relationship, no other suggestion is made with regard to use of weapons. Another injured person, Dipsing Bhimsing, is P.W.4, Ex.26. He has also given similar version narrating the whole incident, including who attacked whom and with what type of weapon. Mr. Raval has rightly submitted that all these witnesses who are also ocular witnesses are consistent and, therefore, question of ambiguity does not arise. Mr. Budhbhatti, learned advocate for the respondents, has tried his level best to convince the Court canvassing ambiguity but his submissions have not appealed to us. We find that the evidence on record is crystal clear, free from any ambiguity, is reliable and is otherwise trustworthy and does not find any place for uncertainty, as held by the learned trial Judge.

The learned Judge has held that in absence of examination of any independent witness in corroboration of the testimony coming from the injured witnesses, case of prosecution becomes weak and such evidence cannot be relied for conviction. We do not find any jacket-type formula or any provision of law which lays down that as a matter of course in every criminal proceeding independent witnesses have to be examined. Independent witnesses are to be examined for corroboration. The examination of independent witnesses is just like a safety valve because normally persons other than independent witnesses would be interested and, therefore, would always be interested to give biased and one-sided version so as to see that the other side is convicted. It is in this background that corroboration by independent witnesses is needed. But non-examination of independent witness by itself may not be a ground to discard rest of the evidence if otherwise is found reliable and trustworthy. If an incident has taken place at such a lonely place where except the accused and injured none else was present or that the possibility of securing independent witness was at all available then question of examination and corroboration does not arise. If an independent witness

was not at all available then where is the question of getting evidence of such witness? This contention would hold good if the defence has been successful in showing possibility of someone (independent witness) seeing the incident and yet not examined by prosecution. On this point, Mr. Raval, learned A.P.P., has invited our attention to paragraph 12 of the complainant's testimony at Ex.23. In his cross-examination, a pointed question was asked about the presence of other villagers and the same was turned down saying that no villager had come there and/or was present there. Similar suggestion was also made to another witness, P.W.3, Chhaganbhai Bhujabhai, Ex.25. P.W.3 is also an injured witness and he has also denied in clear terms that at the relevant time no independent person, that is, villagers assembled there and witnessed the incident. This evidence dismisses the possibility of any independent witness being present and witnessing the incident. If there was no possibility of independent witnesses remaining present, question of corroboration, of prosecution evidence coming through and from injured witnesses, does not arise. Therefore, learned Judge has committed an error in appreciation and discarding other reliable evidence brought on record by the prosecution. The prosecution has also examined other injured witnesses but we need not to discuss for simple reason that they have also deposed on the same line and their testimony is consistent with that of others and any more discussion would amount to repetition only burdening the record. But, in short, we can say that as regards place of occurrence, use of weapons and occurrence of events, entire evidence brought forward through witnesses is consistent, reliable and trustworthy. No concrete case is made out in cross-examination by the defence so as to create any doubt about their credibility and reliability.

Apart from this, the witnesses who have given ocular account are none else but injured witnesses. If the evidence of such injured witnesses if otherwise reliable and trustworthy then in our view, carries more weight and cannot be thrown away merely because is not corroborated by independent witnesses. On this point, Mr. Raval, learned A.P.P., has also placed reliance upon a decision of this Court in the case of State of Gujarat v. Bharwad Jakshibhai Nagribhai, reported in 1989 (2) GLH, 263. In our view, this squarely fortifies the observations made by us hereinabove. In a latest decision of the Supreme Court in the case of Bonkaya v. State of Maharashtra, reported in 1995 (2) SCC, Vol. 6, page 447, it is held that injured witnesses are stamped witnesses, whose presence admits no doubt as being themselves the victims,

they would not leave out the real assailant and substitute them with innocent persons. In view of this observation, we hold that the evidence of the witnesses who are also injured witnesses, carries much weight and cannot be thrown away. No such circumstance has been brought to the notice of the Court either through examination under Section 313 of Cr.P.C. or through cross-examination that the testimony is otherwise not reliable and not trustworthy and, therefore, we hold that the incident did occur, the accused are the real assailants and, therefore, the judgment of the learned trial Judge deserves to be upset to that extent.

The next evidence to be appreciated is about the nature of offence committed. As stated in the very preamble of this judgment, respondent No.1 has already expired on 7.9.1987 during pendency of this appeal and the appeal abates so far as respondent No.1 is concerned. Of course, it is the case of prosecution that at the relevant time accused No.1/deceased respondent No.1 was armed with scythe and had given fatal blow to deceased Bhikhabhai Bhimabhai. But, now this evidence is of no avail and we stay our hands back from appreciating. It is the case of prosecution that accused No.2 was armed with spear and accused Nos.3 and 4 were armed with sickles. The dispute in background of the incident is with regard to reaping crop. It has also come on record that there was a civil dispute between two groups about ownership of the field in question. There were also rival claims with regard to right of reaping the crop. A litigation was also going on in the court of Mamlatdar at Padra and same resulted in favour of the complainant just a day preceding the day of incident. Some litigation was also in anticipation and, therefore, accused No.2 had also filed caveat in the Civil Court of Padra. In the background of unclinching evidence about civil dispute and litigations going on between two groups, the question was as to which of the group should reap the crop? At the relevant time, accused were already cutting wheat crop and at the same time the complainant and his deceased father-in-law alongwith labourers also went to the field for cutting crop. Thus, this becomes evidently clear that there was rival claim between both the groups for cutting crops and/or ownership thereof. It is clear that the right of accused was challenged by the complainant and his father-in-law. In this background, the accused may have reasonable apprehension about attack from the complainant and his associates. It has also come on record that the actual incident was preceded by hot exchange of words. Hot exchange of words challenging the rival claims about cutting crops might have raised

reasonable apprehension of attack in the mind of accused and, therefore, with a view to give thrashing or to teach lesson, the accused might have intended to attack the complainant and his father-in-law but without intention of causing death much less having knowledge for causing death. As we said, only intention which can be gathered was to give them thrashing to teach them lesson so that they may withdraw themselves from staking their claim and right of cutting crop. The ultimate idea was to prevent the complainant from entering the field, cut and take away the crop. In short, it was the intention to protect their property, may be under a mistaken fact or belief, but yet the injuries caused were so grievous and serious that ultimately resulted into the death of Bikhabhai Bhima. On the face of it, death has been caused yet, in our view, it is not a case of culpable homicide amounting to murder as would be squarely falling under sub-section (2) of Section 302 of IPC, may be a case of exceeding right of private defence and, therefore, the accused cannot be held guilty for commission of offence punishable under section 302 of IPC. Under such circumstances, the accused when in plural cannot be held guilty for vicarious liability and will be liable for individual act.

As discussed above, the fatal blow was given by the accused, but, as aforesaid, since he is no more, the evidence in this regard has no value and cannot be appreciated in any way. However, Mr. Raval has argued that all the accused had common intention and, therefore, though the main accused is not there yet rest of the accused can be convicted for thee offence committed by who is no more. We have discussed the prosecution evidence hereinabove. From the evidence, nothing can be culled out that the accused had common intention of committing any wrong. At the relevant time, all the accused were working on the agricultural field reaping the crop. All of a sudden, the complainant and his father-in-law alongwith labourers came there and challenged their right and was followed by hot exchange of words and then the actual incident took place. With this evidence, it is difficult to hold that the accused shared common intention of causing death of deceased Bhikhabhai Bhima. As discussed hereinabove, the only intention of accused was to prevent the complainant and his persons from taking away the crop and challenging their right and ownership. In otherwords, the accused were acting in self-defence for protecting their property, the crop. If common intention cannot be attributed qua involvement of all the accused, then in our view, all the accused cannot be held jointly and

vicariously guilty for any offence committed by any one of them. If this is so, then the only course available to this court is to hold them guilty for individual act and, therefore, the accused Nos.2, 3 and 4 can only be held guilty for individual act.

The evidence is consistent that accused No.2 was possessing spear at the relevant time and had attacked the deceased as well as other witnesses. It is evidently clear from the testimony of P.W.2, the complainant, that accused No.2 had attacked the witness Dipsing and Prabhatsing with spear. If we look at the injuries sustained by injured Dipsing, it is clear that he had sustained minor injuries in the nature of incised wound of 3/4 cm x 1/4 cm over upper right arm, right femur and chest. Some tenderness was also noticed. It is needless to say that accused No.2 was in possession of a dangerous weapon, that is, spear, and therefore, the act of accused No.2 causing injuries to witness Dipsing, would be covered under Section 324 of IPC. Then comes the question of injuries received by witness Chhaganbhai Bhujabhai, P.W.3. Medical evidence has been brought on record, through P.W.1, Dr. Mathius Kakkanathu Ittyibe, Ex.16. This witness has performed post-mortem examination of deceased Bhikhabhai Bhima and also gave primary treatment to injured Dipsing and Chhaganbhai. The injury certificate in relation to witness Chhaganbhai Bhujabhai is placed at Ex.19. It is evident from the evidence of P.W.1 and Ex.19 that Chhaganbhai Bhujabhai had a close fracture of left femur coupled with six other injuries. Out of six injuries, three injuries were bone deep, one was tissue deep and other two were in the nature of contused lacerated wound. The witness has deposed that initially he remained in hospital as indoor patient for a period of six days in the first phase and then for 27 days. Therefore, looking to the nature of injuries and the period of treatment, we hold that the case of witness Chhaganbhai would be covered under Section 326 of IPC. The witness Chhaganbhai was attacked and injured by accused Nos.3 and 4 with sickles. Chhaganbhai has categorically stated that accused No.3 had given sickle blow on his head followed by second blow by accused No.4, in left arm then again both the accused jointly attacked Chhaganbhai and, therefore, in our view, accused Nos.3 and 4 are to be held liable for causing grievous hurt by dangerous weapon to the witness Chhaganbhai. It is needless to say that it is needless to say that the weapon which was used by accused at the relevant time is sickle, a sharp edged round shaped blade, which is sufficient to cause grievous hurt to any person and, therefore, both the accused are to be held

guilty for commission of offence under Section 326 of IPC. In light of this observation, we hold that the learned trial Judge has committed an error in appreciating evidence and discarding same. In our view, accused No.2, by causing injury to witness Dipsing has committed offence under Section 324 of IPC and accused Nos.3 and 4 have committed offence under Section 326 of IPC for causing grievous hurt to witness Chhaganbhai Bhujabhai. Therefore, the judgment of the trial court deserves to be set aside.

Accused Nos.2, 3 and 4 are present in court personally. The learned advocates M/s. Budhbhatti and Vasavada, representing them are also present. They have been heard about sentence. They have prayed for mercy only.

Plea of mercy has to be weighed in light of the pain, shock and sufferings which has already been undergone by the injured. From the record, it transpires that for no reasonable justification the injured were attacked by the accused with dangerous weapons. The weapons used are such that even blows given at vital parts could have resulted into death and in fact deceased Bhikhabhai Bhima has been the victim of this attack and, therefore, showing mercy will not serve the purpose and the sentence should be little deterrent. Accordingly, we find merits in appeal. Same stands allowed.

Judgment and order of trial Court is set aside.

Accused No.2, Prabhat Jetha, is held guilty for offence under Section 324 of IPC and sentenced to undergo rigorous imprisonment for six months and also to pay fine of Rs.1,000/-, in default, to undergo simple imprisonment for one month. The period of sentence undergone by him during trial to be given set off. Accused Nos.3 and 4, Gemal Jetha and Arjun Prabhat respectively, are held guilty for offence under Section 326 of IPC and are sentenced to undergo rigorous imprisonment for a period of one year and each of them is also to pay fine of Rs.1,500/-, in default, to suffer simple imprisonment for 1 1/2 months. The period of sentence undergone by them during trial to be given set off.

At the oral request of Mr. Budhbhatti, learned advocate for respondents/accused, the accused are granted time till 29.2.1996 to surrender before the trial court.

Appeal against respondent No.1/accused No.1 stands abated.